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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE VERDUZCO AGUILAR, Defendant and Appellant.	2d Crim. No. B211374 (Super. Ct. No. BA140965) (Los Angeles County)

Jose Verduzco Aguilar appeals from the denial of a motion brought under Penal Code section 1016.5[1] to vacate his 1996 guilty plea to committing a lewd act on a child under 14 (§ 288, subd. (a)). He contends the motion should have been granted because he was not properly advised of the immigration consequences of his plea, and that the record does not reflect his understanding of those consequences. He also claims he should have been allowed to vacate his plea on the ground of ineffective assistance of counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant, a citizen of Mexico, was granted resident alien status in 1988. On December 18, 1996, he entered a plea of guilty to one count of committing a lewd act on a child under 14. The prosecutor advised appellant prior to the plea that "[i]f you are

[1] All further undesignated statutory references are to the Penal Code.

not a citizen of this country, entering a plea today could cause you to be deported, could deny you reentry, naturalization in the future, and it could affect your immigration status." He was granted eight years formal probation, with terms and conditions including that he serve one year in county jail and register as a sex offender.

On August 6, 2006, appellant was denied admission to the United States from Mexico due to his registration as a sex offender. He thereafter moved to set aside his plea pursuant to section 1016.5. The motion was denied, and this appeal followed.

DISCUSSION

I.

Appellant contends that his section 1016.5 motion was erroneously denied because he was not properly advised of the potential immigration consequences of his plea. Specifically, he argues that the advisement that he could be "denied reentry" as a result of his plea was too vague to convey that it could lead to his "exclusion from admission to the United States," as provided in section 1016.5, subdivision (a). Because appellant did not challenge the advisement on this ground below, the argument has been forfeited. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) In any event, the claim lacks merit.

Section 1016.5, subdivision (a), provides: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." A defendant who does not receive this advisement may be entitled to withdraw his or her plea. (§ 1016.5, subd. (b).) To obtain relief, the defendant must demonstrate that (1) the court taking the plea failed to advise the defendant of the immigration consequences as provided by section 1016.5, (2) the defendant actually faces one or more of the statutorily specified immigration consequences as a result of the plea, and (3) the defendant was prejudiced by

the court's failure to provide complete advisements. (*People v. Totari* (2002) 28 Cal.4th 876, 884.) We review the trial court's ruling for an abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

The precise claim appellant raises here, i.e., that "reentry" could be reasonably construed in this context to mean something other than "exclusion from admission to the United States," was expressly considered and rejected in a case he fails to cite in his opening brief. In *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 171, the defendant was orally advised at the time of his plea, "'If you are not a United States citizen, you will be deported from the United States, denied re-entry and denied amnesty or naturalization. . . .'" The defendant, like appellant, argued on appeal that the advisement was insufficient to convey to him that his plea could result in his exclusion from admission to the United States, as contemplated by subdivision (a) of section 1016.5. In rejecting the claim, the Court of Appeal reasoned: "only substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea. Appellant was expressly told that one of the immigration consequences of his conviction was that he would be denied reentry into the United States; in other words, under the statute, he would be excluded from the United States. The trial court, thus, substantially complied with the statute, and, hence, committed no error in the manner in which it took appellant's plea." (*Id.* at p. 174, fn. omitted.)

In his reply brief, appellant asserts that "[t]he *Gutierrez* Court appears to have made a mockery of our Legislature and imposed its own opinions over those of the People of California and the California Legislature." This ad hominem attack is inappropriate and does not further appellant's position. He purports to justify his impugnment of the court with a citation to *People v. Gontiz* (1997) 58 Cal.App.4th 1309, disapproved on another ground in *People v. Superior Court (Zamudio), supra,* 23 Cal.4th at page 200, footnote 8, yet fails to mention that *Gontiz* was expressly distinguished by the *Gutierrez* court on the very point for which it is offered here.

The *Gutierrez* court explained the distinction as follows: "In *Gontiz*, the Court of Appeal reversed two convictions because the trial court had failed to advise the defendant that he could be 'excluded' from the United States; the only admonishments pertained to deportation and naturalization. . . . [¶] . . . At most, *Gontiz* stands for the proposition that a generalized statement that a guilty plea may have 'immigration consequences' is insufficient to comply with section 1016.5." (*People v. Gutierrez, supra*, 106 Cal.App.4th at p. 173, fn. omitted.) The court went on to conclude that "[a]ppellant's effort to convert *Gontiz*'s reminder that trial courts must be faithful to the statute into a rule that any variance from the literal language of the legislation requires a plea to be vacated is unsupported for two reasons. First, the Supreme Court in *Zamudio* has implicitly recognized that substantial, not literal, compliance with section 1016.5 is sufficient. . . . [¶] Second, both *Zamudio* and *Gontiz* make clear that the words used by the prosecutor here were the equivalent of the statutory language. '"Exclusion" is "being barred from entry to the United States." [Citation.]' (*Zamudio, supra*, 23 Cal.4th at p. 207.) 'Deportation is to be distinguished from exclusion, which is the denial of entry to the United States. [Citation.]' (*Gontiz, supra*, 58 Cal.App.4th at p. 1317.)" (*Gutierrez, supra*, at pp. 173-174.)

We reach the same conclusion here. Appellant was expressly advised of all three immigration consequences he might face as a result of his plea. While the advisement he received was not a verbatim recitation of the one stated in section 1016.5, subdivision (a), it was nevertheless sufficient to comply with the statute.

II.

Appellant asserts that he should have been allowed to withdraw his plea on the ground that his attorney in the prior proceeding provided ineffective assistance by failing to advise him of the immigration consequences of his plea. As the People correctly note, trial courts lack jurisdiction to decide claims of ineffective assistance of counsel in the context of a motion brought under section 1016.5. (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1290.)

In his reply brief, appellant asserts he "did not make his claim of ineffective assistance of counsel through his Penal Code §1016.5 motion. Rather, Appellant's claim of ineffective assistance of counsel was brought pursuant to *People v. Fosselman* (1983) 33 Cal.3d 572, which holds that a defendant may open a new trial by presenting the issue or his defense counsel's effectiveness to the trial court." Appellant fails to appreciate, however, that "a new trial motion is made *prior to judgment*, and *Fosselman* contemplates a determination of the effectiveness of counsel based on the court's own observations at trial." (*People v. Chien, supra*, 159 Cal.App.4th at p. 1289, italics added.) Appellant's claim was made several years after the judgment, and was raised before a different judge. Moreover, although appellant labeled his ineffective assistance claim nonstatutory, it was raised in a noticed motion to vacate the judgment under section 1016.5. The trial court therefore had no authority to entertain the claim. (*Id.* at pp. 1290-1291.)

III.

Appellant argues that he was entitled to withdraw his plea pursuant to section 1016.5 because he was not asked whether he understood the advisement regarding the immigration consequences of his plea. He offers no authority, however, for the proposition that an express affirmation of his understanding was necessary to a finding that his plea was knowing, voluntary, and intelligent. Section 1016.5 merely requires the court to give the advisement. Moreover, we presume the defendant understands the advisement if it is given in his or her language. (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1525-1526.) "[O]nce the defendant receives a subdivision (a) *advisement* from the trial court prior to the plea, the defendant can no longer claim that the defendant was *unaware* of the immigration consequences specified in that advisement." (*Ibid.*) That is what happened here.

The order denying the motion to vacate appellant's guilty plea is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

George G. Lomeli, Judge

Superior Court County of Los Angeles

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